Filed 11/28/16 P. v. Frazier CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

HENRY LEE FRAZIER, JR.,

Defendant and Appellant.

F070434

(Tuolumne Super. Ct. No. CRF31263)

OPINION

APPEAL from a judgment of the Superior Court of Tuolumne County. James A. Boscoe, Judge.

William I. Parks, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Barton Bowers, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant/appellant Henry Lee Frazier, Jr., was convicted of diverting construction funds. As a result, the superior court revoked his contractor's license.

Defendant challenges both the judgment and the revocation of his contractor's license. We reject those challenges and affirm.

BACKGROUND

In a complaint executed on November 20, 2009, defendant was charged with one count of diverting construction funds.[1] (Pen. Code, § 484b.)[2] A jury convicted defendant, and the court revoked defendant's contractor's license. (See Bus. & Prof. Code, § 7106.)

In an opinion filed on August 6, 2013, this court reversed defendant's conviction because the trial court failed to give a unanimity instruction to the jury. (*People v. Frazier* (Aug. 6, 2013, F062053) [nonpub. opn.].) The order revoking defendant's contractor's license was also reversed. (*Ibid*.) This court remanded the matter "for possible retrial, and possible rehearing under Business and Professions Code section 7106." (*Ibid*.)

On remand, defendant made a motion to represent himself under *Farretta v. California* (1975) 422 U.S. 806, which the trial court granted. Defendant was retried, and on September 25, 2014, a second jury convicted defendant of diverting construction funds.

On October 21, 2014, the Registrar of Contractors with the Contractors' State Licensing Board filed a motion recommending the court revoke defendant's contractor's license. (See § 23.)

At sentencing, the court ordered defendant's contractor's license revoked. The court admitted defendant to probation for 5 years with several conditions. Defendant was to serve 60 days in county jail, with credit for time served of 30 actual days. Defendant was to pay: restitution of $28,072.42 to Joel and Gail Johnson; a restitution fine of $1,200 (§ 1202.4, subd. (b)); an additional restitution fine of $1,200 (§ 1202.44), which

[1] The complaint was later deemed to be an information.

[2] All further statutory references are to the Penal Code unless otherwise stated.

was suspended pending termination of probation; and a fine of $1,070 payable to the Office of Revenue Recovery.

Defendant appeals.

FACTS

Joel Johnson's Testimony

In 2007, Joel Johnson and his wife wanted to enlarge their master bedroom and expand the front of their house. Defendant's brother, Anthony Frazier, drew up plans for the work. Anthony mentioned to the Johnsons that he had been doing some work with his brother. Joel understood the name of Anthony and defendant's joint business venture to be "Baywest Development."[3]

Joel applied for a building permit on December 31, 2007. Anthony accompanied Joel to help him understand the process. At the time, Joel was not certain as to who was going to be the contractor for the job. However, "it was looking more likely that it would be Henry and Anthony, Baywest." Joel needed to identify a contractor for the permit and include his or her contractor's license number. The permitting authority told Joel he could change the contractor at a later date. Since he was "considering" having defendant do the project, Joel "figured" he would use defendant's license number. He thought that since Anthony was defendant's partner, he did not need defendant's permission. Defendant had no involvement in obtaining the permit.

At some point – "probably" a couple of weeks before July 16 – defendant met with Joel to "talk about possibilities." Joel told defendant he only had " 'around $40,000 right now' " for the project. Joel showed defendant blueprints of the desired project.

A check dated June 27, 2008, was made out to Baywest Development with a memo line reading " 'drawings revision.' "[4] Joel did not recall what the purpose of the

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[3] Other testimony would indicate that Anthony was merely an independent contractor of Baywest Development.

[4] The check, which was introduced as evidence, was made out for $869.00.

check was. He testified "there were issues that came up and we just tried to deal with each one as it came up."

On July 16, 2008, Joel and Baywest Development executed a contract for the project. Joel testified the price of the project, $64,135.00, was "more than what we had currently, but we figured that by the time we got to the end of the project, we could come up with the extra." The contract also called for "three different payments at three different times." Joel signed the contract, as did defendant on behalf of Baywest Development. That same day, Joel paid the first installment payment of $21,378.35 by check payable to Baywest Development pursuant to defendant's instructions.

"[A]t some point," Joel realized that Anthony had not indicated in the plans that there would be "extra foundation" put in as part of the project. This would also involve changing a roofline and adding a "little extra" square footage. As a result of this correction, a second permit was obtained. No one approached Joel to change the contract even though it had been based on the first permit.

During the first day of work, Joel observed several people outside, including defendant. He also saw a Bobcat leveling out land in front of the house. At some point, Joel saw Anthony operating the Bobcat. This surprised Joel because Anthony was an architect, not a "get-your-fingers-dirty kind of guy." Joel also observed that the work "went in spurts" with "a little bit of activity and then some inactivity."

Joel testified that a year before work started on the present project, he had a tree remover extract a particular tree from his yard and grind its stump down as far as he could. When defendant began to work on trenching for the current project, he came across roots from the tree. !(2 RT 327)! The roots were difficult to remove and, according to Joel, "[a]pparently, you can't have a root under the footing." Defendant told Joel they had worked for days to remove the roots. Joel did not see any large excavations around the roots.

Joel spoke with Anthony and changed the blueprints. According to Joel: "[W]hat we did was basically flip flopped which side of the building was going to stick out a little further [*sic*] than the other half."

At some point, defendant requested $3,500 for windows. Joel gave defendant his credit card number so defendant could go to the vendor and purchase windows. However, according to Joel's credit card statement, payment was in fact made to Baywest Development. Joel was able to have the charge reversed.

Defendant approached Joel and said he would like to use an insulated material for the foundation. The blueprints had "reflected a conventional foundation" would be used for the project. But Joel thought "as long as we stay within the budget, and you're the contractor, so whatever you think is best."

Defendant had the trenches dug and forms put in place to pour concrete. Before the concrete was actually poured, defendant came to Joel and requested the second installment payment. Joel testified that, under the contract, the second installment was to be paid "when the framing was up and the roof was ready to get its covering." Nonetheless, defendant requested the second payment because the first payment had been spent, defendant "wanted to be able to have all the materials there in our front yard so that … everything was ready to go." While Joel thought the request was premature, he "figured that, 'Okay, I trust him. Let's get this job moving forward – continue to move forward.' " Joel issued a check dated August 20, 2008, to Baywest Development in the amount of $21,378.35. However, none of the materials defendant had mentioned ever arrived.

"Not a lot" of progress was made from August 20 until October 12, when defendant oversaw the pouring of the concrete.[5] After the concrete was poured, Joel's

[5] Joel later testified he issued a check dated September 24 to Baywest Development for $3,800 for architectural changes. Joel did not recall precisely what the payment was for, though he thought he received a letter itemizing the $3,800 charge. The

relationship with defendant soured because no one showed up to do additional work, and no materials were delivered for months. Joel and defendant played "a lot of phone tag," but when they did speak defendant offered "a lot of excuses and stuff."

In a letter dated November 21, 2008, defendant told Joel that Baywest Development was leveraging $35,000 to complete the project in six weeks. Joel also interpreted the letter as defendant asking him for $10,500 to pay for trusses for roofing.

In a letter dated December 3, 2008, defendant conveyed that "the money is gone" and requested to finish the job on "a time and materials basis."

Joel contacted a lawyer, who advised that he not communicate with defendant. Joel also filed a complaint with the Contractors' State License Board (CSLB), and a claim against defendant's bond company. The bond company eventually paid the Johnsons $10,500 or $12,500.

Ultimately, Joel paid other contractors $25,000 to do some of the work that defendant was supposed to do under the contract.

Michael Dewald's Testimony

Michael Dewald (Dewald) is a licensed general contractor and construction consultant. In his capacity as a construction consultant, Dewald investigates and inspects job sites for bonding companies. He has done so in "[p]robably well over 600" cases.

HCC Surety Group contacted Dewald to investigate the Johnson's claim of "poor workmanship"; defendant's receipt of payments "in excess of the work performed"; and possible "abandonment." Dewald inspected the Johnson's property on July 2, 2009. He estimated that defendant had satisfactorily completed only 18 percent of the project.[6] Dewald saw no justification for defendant to have stopped work on the project when he

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$3,800 charge was not "unexpected because there were changes from the original blueprints and stuff."

[6] Dewald also concluded that some of the work that had been completed did not meet industry standards.

did. Dewald determined that defendant should have still had $31,212, to complete the project.

Donn Marinovich's Testimony

Donn Marinovich (Marinovich) is also a licensed general contractor and construction consultant who performs inspections for the CSLB. The CSLB directed Marinovich to inspect the Johnson property.

Marinovich determined that the insulated concrete forms (ICF) being used for the foundation were not designed to be used in the way defendant had used them. ICF does not provide the same structural integrity as would have been provided by the engineered foundation that should have been used.

Marinovich "figured the fair market valuation for the concrete foundation work done per the plans … would have been $4,408.00." This figure included "[l]abor, materials, and services."

John Bruce's Testimony

In 2009, John Bruce (Bruce) worked as an investigator and case manager for the CSLB. Bruce reviewed the contract between the Johnsons and Baywest. He noted that the "state license" – presumably a reference to a contractor's license – belonged to "Baywest Electric," but the contracting party was "Baywest Development." When asked if the discrepancy had any implications, Bruce replied, "[I]n this case, everything worked out okay."

Bruce asked defendant why no work had been completed since the pouring of the foundation. Defendant said he had spent the money "doing the work on the case" and was now "short of money." Defendant indicated he was interested in completing the contract. Bruce initially testified that defendant did not tell him the contract could be completed "within the confines of the original discussion."[7] However, after being shown his own testimony from "another proceeding about this matter," Bruce testified that

[7] This quotation is from the question posed to Bruce.

defendant *had* told him the contract could be completed within the original contract amount.

Bruce told defendant to contact the Johnsons to inquire about completing the job. Defendant left Bruce a voicemail on April 22, 2009, saying he and the Johnson had agreed that defendant would complete the job. Defendant said he made an appointment with the Johnsons to resume work on April 27, 2009. Defendant also referenced some materials that had been delivered to the site. However, Bruce learned from the Johnsons that they had in fact not reached any agreement with defendant and no materials had been delivered. Later on April 22, 2009, defendant again called Bruce to tell him that he had actually just "given an option to the Johnsons to see if he could settle their complaint by some type of cash offer to them."

Martin Knight's Testimony

In 2009, Martin Knight (Knight) was working as an investigator with the Tuolumne County District Attorney's Office.

Knight reviewed bank records pertaining to Baywest Development Company. Knight was able to verify four checks from the Johnsons deposited in Baywest Development Company's business account. The check amounts were $869.00, $21,378.35, $21,378.35, and $3,800.

Knight also reviewed records pertaining to defendant's own bank account from April 2008 through September 2008. The records indicated several transactions at four locations: the Lucky Chances Casino, the Palace Club, the Bay 101 Club, and the Oaks Card Club. Each of these establishments is either a casino or "gaming casino-type business."

In April 2008, there were 15 transactions on the account from Lucky Chances over the span of six days totaling $4,167.70. In May 2008, there were: 32 transactions at Lucky Chances over the span of 13 days totaling $12,274.35; four transactions at Palace Club over the span of two days totaling $772.00; and seven transactions at the Oaks Card

Club over the span of two days totaling $2,375.00. In June 2008, there were: 13 transactions at Lucky Chances over the span of seven days totaling $5,226.35; five transactions at the Palace Club over the span of three days totaling $835.00; and three transactions at the Bay 101 Club over the span of two days totaling $1,531.50. In July 2008, there were: 22 transactions at Lucky Chances over the span of eight days totaling $5,248.45; two transactions at the Palace Club over the span of two days totaling $186.00; and one transaction at the Oaks Card Club totaling $106.50. In August 2008, there were: three transactions at Lucky Chances over the span of three days totaling $809.00; and eight transactions at Bay 101 Club over the span of five days totaling $2,873.50. In September 2008, there were: 11 transactions at the Lucky Chances over the span of four days totaling $3,590.80. In October 2008, there were: nine transactions at Lucky Chances over the span of seven days totaling $2,282.90. Knight testified that, in total, there were 135 transactions totaling $42,279.05.

Knight also discovered "gaming-related withdrawals" from the Baywest Development business account. For May 2008, the account showed three transactions at Lucky Chances totaling $909.00. For July 2008, the account showed transactions of $2,588.20, $1,036.45, and $415.75 at the Bellagio Casino Resort in Las Vegas. For August 2008, the account showed transactions at the Lucky Chances casino of $303.00, $321.99, $216.99, $216.99, $303.00, $426.99, and $321.99; and at the Bay 101 Club for $303.00, $530.00, $303.00, $303.00, $303.00, and $303.00. The total of these transactions from May to August 2008 is $9,105.35.

Knight did not see any records indicating money had been transferred from the Baywest Development account into defendant's own account.

Douglas Oliver's Testimony

Douglas Oliver is the chief building inspector for Tuolumne County. Oliver testified that Joel Johnson is listed as a contractor on one of the permits. In September

2008, one of the inspectors who works for Oliver approved the foundation after an inspection.

Yolanda Richardson's Testimony

Yolanda Richardson (Richardson) is defendant's wife and was the operations manager for a company called Baywest Electric. Her responsibilities included bookkeeping, answering phones, and sending technicians out on jobs. She also did "pretty much the same thing[s]" for Baywest Development. Richardson testified that Baywest Electric was "an electric service company" that had a C-10 "electrical" license and a "B license" for general contracting. Baywest Development, in contrast, was "a design and drafting company." Anthony Frazier works with Baywest Development as an independent contractor performing design work. Anthony Frazier provided design and drafting services to the Johnsons.

Richardson testified that she received payments from the Johnsons in connection with the work Baywest Development was doing for them. The first payment was dated September 27, 2007 for $1,000; the second payment was dated December 3 for $1,700; the third payment was also dated December 3 for $1,700; and the fourth payment was dated December 31 for $1,377.50. Richardson later identified two other checks deposited to Baywest Development's checking account, each in the amount of $21,378.35.

Richardson explained that money would be transferred from Baywest Development to Baywest Electric because payroll was paid through Baywest Electric. Richardson describe the contents of a payroll summary report dated August 4, 2008. The payroll report indicated that the gross pay for Anthony Frazier, Jr., was $246.00; gross pay for defendant was $1,650; and gross pay for Richardson was $800. Richardson testified that other documents indicated that total payroll expenses were $3,902.23 for the week of August 4, 2008; $2,637 for the week of August 11, 2008; $3,207.97 for the week of August 18, 2008; $2,987.29 for the week of August 25, 2008; $2,863.49 for the week of September 3, 2008; $2,981.91 for the week of September 9; $258.36 for the week of

September 18, 2008; $118.41 and $322.95 for the week of September 29, 2008; and $5,274.85 for the week of October 20, 2008.

On cross-examination, Richardson testified that the $1,036.45 and $415.75 transactions at the Bellagio from Baywest Development's business account were not business expenses. Richardson also testified that several transactions at Lucky Chances and Bay 101 Club were not business transactions.

Defendant would sometimes wear Baywest apparel while playing in poker tournaments.

Baywest Electric paid employees a total of $38,955.41.[8]

Anthony Frazier, Jr.'s, Testimony

Anthony Frazier's son, Anthony Frazier, Jr., testified that a man named Walter Hill recommended the special insulated block system for the foundation. Anthony Frazier, Jr., went to Reno, Nevada, to pick up the block system for the foundation at the direction of Walter Hill. Anthony Frazier, Jr., installed more than 60 of these blocks on the Johnson project.

Anthony Frazier, Jr., would assist his father picking up equipment for the Johnson project "[u]sually every morning." Anthony Frazier, Jr., was paid on a weekly basis at a rate of $10 per hour.

Nathaniel Frazier's Testimony

Nathaniel Frazier is also Anthony Frazier's son and Anthony Frazier, Jr.'s, brother. Nathaniel worked on the project at the Johnson residence and was paid $8.00 per hour. Nathaniel recalled working on the foundation in front of the house. They encountered a tree "stump" in the ground and used "various tools" to try to get around it.

[8] Richardson was asked what was the "total amount paid to the employees" of Baywest Electric. Neither the question nor the answer indicates what portion of the $38,955.41 paid to employees related to work done on the Johnson project.

Anthony Frazier's Testimony

Anthony Frazier testified that Walter Hill was a structural engineer who designed the foundation with an ICF system. Anthony Frazier believed Walter Hill sent him and his son to pick up insulated concrete forms in Reno, Nevada. Anthony Frazier was paid $750 in cash on a weekly basis.

DISCUSSION

I. The Court did not Err in Failing to Give a Limiting Instruction Sua Sponte

Defendant's bank records were introduced as evidence at trial. Defendant contends "the court erred in failing to give a limiting instruction" delineating the proper purposes for which the jury could consider the bank records. The Attorney General observes that defendant did not request that such an instruction be given.

A. Background

In the trial court, the prosecutor sought to admit the bank records on the issue of motive. Defendant responded:

> "I would object to that. The matter is about, basically, a project that went bad. That project began on – 7-16, in the middle of the month of July, where we first received the first monies for this project. Anything previous to that time and date should not be allowed in this court, should not have been mentioned before any jury, because what it does, it poisons the case and it puts the defendant in an unfair disadvantage."

The court admitted the bank records over defendant's objection.

The court did not instruct the jury with CALCRIM No. 303 which provides: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other." (CALCRIM No. 303.) Nor did the court instruct the jury with any other limiting instruction applicable to the bank records.

B. Analysis

Defendant concedes he "never made a specific request for an instruction limiting the use of the banking records...." However, he argues that such a request "may be reasonably inferred from the objections to the evidence." We disagree. Defendant was

clearly objecting to the evidence as altogether inadmissible. That is not the same as requesting a limiting instruction concerning admissible evidence.

Defendant also argues that even though he failed to request a limiting instruction, the court has a sua sponte duty to ensure the jury was properly instructed. We disagree. " ' "[E]ven in the absence of a request, a trial court must instruct on the general principles of law governing the case, i.e., those principles relevant to the issues raised by the evidence…." ' " (*People v. Barajas* (2004) 120 Cal.App.4th 787, 791.) However, the court " ' "need not instruct on specific points developed at trial" ' " absent a request. (*Ibid*.) We agree with *People v. Simms* (1970) 10 Cal.App.3d 299, which held:

> "Although in criminal cases the court has the duty of giving on its own motion, instructions on the pertinent general principles of law commonly or closely and openly connected with the facts of the case before the court [citations], there is no duty, in the absence of a request, to give an instruction limiting the purpose for which evidence may be considered. [Citations.]" (*Id.* at p. 311.)

Consequently, we reject defendant's claim. Because we find no error, we do not address the issue of prejudice.

II. Unanimity Instruction

Defendant argues the court erred in failing to give a unanimity instruction.

A. Background

After the close of evidence, the court discussed jury instructions with the prosecutor and defendant outside the presence of the jury. The court initially framed the discussion as pertaining to *which* unanimity instruction to give – CALCRIM No. 3500 or 3501 – rather than *whether* to give a unanimity instruction. During the discussion, the court asked the prosecutor what acts he was relying on to support the elements of the diversion charge. The court also said, "The question is, did he willfully fail to apply the money for the purpose by either: One, you have got failing to complete the many improvements for which the funds were provided; Or, willingly failed to provide for services, labor, material, or equipment provided incident to such construction." (See

§ 484b.) The court's question was clearly directed to the fact that section 484b permits a prosecutor to prove willful failure to apply funds for a proper purpose in one of two ways: "by either willfully failing to complete the improvements for which funds were provided or willfully failing to pay for services, labor, materials, or equipment provided incident to such construction…." (*Ibid*.) The prosecutor observed that "the evidence that the People put forth did not consist of any willfully failing to pay for services, labor, materials, or equipment provided. So, actually I think element B is inapplicable." The prosecutor went on to say that not only was that element inapplicable, "I don't intend to argue it. I intend to argue that the diversion was failing to apply such money by failing to complete the improvement and by listing my evidence there. There has been no evidence provided of any paying of or any failing to pay for any services and labor … I understand now, Mr. Hansen, in the previous case, got in evidence of the whole brouhaha with Calaveras Lumber and some other issues. This case was tried differently." [9] The prosecutor concluded his comment by saying he did not think a unanimity instruction was required.

After additional discussion, the court observed that "in this case, based on the evidence I have heard, there was no evidence of failing to pay for services, labor, materials, or equipment that was used in this project." The prosecutor said that the theory that defendant violated section 484b by willfully failing to pay for services, labor, materials or equipment was "not applicable" and "should be stricken." The prosecutor

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[9] The Attorney General argues the prosecutor "specifically disclaimed" the theory that defendant was guilty because he had willfully failed to pay for project materials. But that disclaimer was not made in front of the jury.

Defendant observes that during in limine proceedings before trial, the prosecutor said he planned to "duplicate" the first trial and simply add a unanimity instruction. But, as the trial record shows and the prosecutor's posttrial comments reflect, the case was not ultimately tried in the same manner. At the first trial, there had been evidence defendant failed to pay a supplier called Calaveras Lumber. (See *People v. Frazier*, *supra*, F062053.) The same evidence was not introduced at the second trial at issue here.

suggested that the instruction on the elements of the offense should be modified to exclude any reference to that theory of guilt. The court agreed. Defendant had no objection to the modification of the instruction on the elements of the offense.

The court instructed the jury on the elements of the offense as follows:

> "The defendant is charged in Count 1 with a violation of Penal Code Section 484b, namely, diversion of construction funds. In order to find the defendant guilty of this offense, the People must prove that:
>
> "One: The defendant received money for the purpose of obtaining or paying for services, labor, materials, or equipment;
>
> "Two: The defendant willfully failed to apply such money to such purposes by failing to complete the improvements for which the funds were provided;
>
> "Three: The defendant wrongfully diverted the funds to another use;
>
> "And Four: The amount diverted was over $1,000."

The instructions did not include language that the second element could alternatively be established by evidence defendant "willfully fail[ed] to pay for services, labor, materials or equipment provided incident to such construction…." (§ 484b.)

No unanimity instruction was given.

B. Unanimity

"In a criminal case, the jury must agree unanimously that [the] defendant is guilty of a specific crime. [Citation.]" (*People v. Benavides* (2005) 35 Cal.4th 69, 101.) "In order to ' "eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed," ' when the evidence suggests more than one distinct crime either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal conduct. [Citation.]" (*Ibid.*)

C. Harmlessness

"Where the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless. [Citation.] Where the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless. [Citation.]" (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853.)

D. Analysis

We conclude that the absence of a unanimity instruction, even if erroneous, was harmless. Therefore, we do not address whether the court erred.

Defendant argues that while the prosecutor argued defendant "took money from the Johnsons, a single act" the evidence actually established that defendant was paid at several different times. For example, Joel wrote a check to Baywest for $869 on June 27, 2008; another check for $21,378.35 pursuant to the signing of the contract on July 16, 2008; another check for $21,378.35 on August 20, 2008; another check for $3,800 on September 24, 2008; and that Joel allowed defendant to use his credit card to spend $3,500 ostensibly on windows. But the fact that each of these payments were made was not in dispute at trial. The jury had no reason to believe some of the payments occurred and others did not. That is, they had no reason to "distinguish between the various acts." (*People v. Thompson*, *supra*, 36 Cal.App.4th at p. 853.)

Next, defendant argues that "the prosecutor introduced numerous banking records which showed withdrawals payable to several cardrooms and casinos in the Bay Area between April and October of 2008. Evidence of a payment to a Las Vegas Casino in July of 2008 was also introduced." Again, these individual transactions were not in

dispute at trial. The jury had no reason to believe some of these transactions occurred and others did not.

Finally, defendant argues that he presented several defenses at trial. The requirement to instruct on unanimity may be triggered by "evidence suggest[ing] more than one distinct *crime*." (*People v. Benavides*, *supra*, 35 Cal.4th at p. 101, italics added.) However, the requirement to instruct on unanimity is not triggered when the evidence merely suggests more than one *defense* to a *single* crime.

III. Defendant Forfeited his Claim the Court Improperly Calculated Restitution

Defendant claims the court erred in requiring defendant to pay $28,072.42[10] in restitution to the Johnsons. Defendant contends he should have received a credit for the amount paid to the victims by his bonding company. The Attorney General contends defendant forfeited this argument by failing to raise it below. We agree that the issue has been forfeited.

Defendant presents several arguments as to why failure to raise a fact-based objection to the amount of restitution imposed should not lead to forfeiture. However, it has already been established that this court may find forfeiture in such circumstances. "An objection to the amount of restitution may be forfeited if not raised in the trial court." (*People v. Garcia* (2010) 185 Cal.App.4th 1203, 1218.) "The appropriate amount of restitution is precisely the sort of factual determination that can and should be brought to the trial court's attention if the defendant believes the award is excessive. Here, because defendant did not object to the amount of restitution in the trial court, he forfeited our consideration of the issue on appeal." (*Ibid*.)

Moreover, we would have rejected defendant's claim on the merits. The $28,072.42 figure was apparently based on the Johnsons' 2011 request for restitution

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10 Verbally, the court imposed restitution "in the amount of – whatever the number is, $28,000." The order granting probation specified that restitution was ordered in the amount of $28,072.42.

which *did* include a credit for the amount paid by defendant's bonding company (i.e., $12,500).[11]

IV. Defendant's Right to Due Process was not Violated

Defendant contends the trial court violated his right to due process of law by revoking his contractor's license without a "full" hearing. We disagree.

A. Due Process

Determining what process is due under the United States Constitution requires consideration of three factors: " 'First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.' [Citation.]" (*Wilkinson v. Austin* (2005) 545 U.S. 209, 224–225.)

Determining what process is due under the California Constitution involves the same considerations, plus an additional factor: "the *dignitary interest* in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible government official …." (*Marquez v. State Dept. of Health Care Services* (2015) 240 Cal.App.4th 87, 112, original italics (*Marquez*).)

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[11] At sentencing, the trial court said, "My feeling is you're not entitled to the credits, that it was paid by virtue of your bonding company." As defendant argues, this does suggest the trial court "was unaware that the amount awarded the Johnsons had already been reduced with a credit for payment" by defendant's bonding company. But we fail to see how that fact prejudiced defendant.

B. Revoking a Contractor's License Under the California Business and Professions Code

The CSLB, through its executive officer known as a "registrar," is empowered to investigate the actions of any contractor within the state. (Bus. & Prof. Code, §§ 7011, 7090.) The registrar may revoke a contractor's license if he or she "is guilty of or commits any one or more of the acts or omissions constituting causes for disciplinary action." (Bus. & Prof. Code, § 7090.)

"Diversion of funds or property received for prosecution or completion of a specific construction project or operation, or for a specified purpose in the prosecution or completion of any construction project or operation, or failure substantially to account for the application or use of such funds or property on the construction project or operation for which such funds or property were received constitutes a cause for disciplinary action."[12] (Bus. & Prof. Code, § 7108.) Additionally, "[a] conviction of a crime substantially related to the qualifications, functions and duties of a contractor constitutes a cause for disciplinary action. The record of the conviction shall be conclusive evidence thereof." (Bus. & Prof. Code, § 7123.)

"[W]ith respect to administrative proceedings or hearings to suspend or revoke a contractor's license, the registrar at all times shall have the burden of proof to establish by clear and convincing evidence that he or she is entitled to the relief sought…." (Bus. & Prof. Code, § 7090) Alternatively, instead of an administrative proceeding, the suspension or revocation of a license "may also be embraced in any action otherwise proper in any court involving the licensee's performance of his legal obligation as a contractor." (Bus. & Prof. Code, § 7106.) The statute does not specify how the matter is to be "embraced" in court proceedings.

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[12] In a different chapter of the Business and Professions Code, section 490 permits the suspension or revocation of a license "on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued." (Bus. & Prof. Code, § 490.)

C. Summary of Relevant Proceedings

After the jury convicted defendant for a second time, the registrar of the CSLB filed a motion seeking to have the court revoke defendant's contractor's license at sentencing. The registrar filed notice of the motion on October 21, 2014, and sentencing took place on October 28, 2014. In the motion's memorandum of points and authorities, the registrar argued that defendant's conviction for diverting funds under section 484b "demonstrates proof of a violation of Business and Profession[s] Code section 490 (conviction of a crime substantially related to contracting), section 7123 (conviction of a crime), and section 7108 (diversion of construction funds)."

The CSLB appeared at the October 28, 2014, hearing through counsel. Counsel for the CSLB submitted the matter on the motion, but mentioned that an administrative hearing was set on the license revocation issue. However, counsel requested that the court decide the license revocation issue instead in order to avoid duplicative hearings and requiring the victims to travel to Sacramento.

The court then asked defendant if he wanted to be heard on the license revocation issue. Defendant argued that he had been "mischaracterized throughout this whole process." He submitted that he had been "a successful business owner back in the year 2008" and "had the pleasure of serving thousands of customers." Defendant also maintained his innocence with respect to the diversion of funds. Defendant argued that the CSLB's accusation against him concerned things "over and beyond diversion of construction funds." Finally, defendant asked that the court have the license revocation issue decided in the administrative hearing scheduled for 2015.

When defendant was done speaking, the following exchange occurred:

"THE COURT: Okay. [¶] Anything else anybody wants to present to the Court before I pronounce sentence?

"MR. PHILLIPS [CSLB's counsel]: No, Your Honor.

"MR. HOVATTER [Trial prosecutor]: No, Your Honor.

"THE COURT: Mr. Frazier?

"[DEFENDANT]: No, Your Honor."

The court revoked defendant's license.

D. Analysis

We conclude the procedure outlined above satisfied due process.

First, we assume without deciding that defendant has a constitutionally cognizable property interest in the license that enables him to work as a contractor. (Cf. *Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, 43.)

Under the Business and Professions Code, a contractor's license may be revoked if a contractor diverts funds (see Bus & Prof. Code, § 7108), *or* if he or she is convicted of a crime related to the qualifications, functions and duties of a contractor. (See Bus. & Prof. Code, § 7123.) The fact that defendant diverted funds was established at a jury trial where defendant could and did present evidence in his defense. The jury concluded diversion was proven beyond a reasonable doubt, and we have rejected defendant's claims that the trial was affected by error.

While defendant claims he should have received a separate "full" hearing on the license revocation issue alone, he does not adequately explain what was constitutionally insufficient about the postconviction law and motion proceeding initiated by the CSLB.[13] (See § 23.) The CSLB filed a noticed motion clearly explaining that license revocation was being sought and outlining the grounds for that request. Defendant could have filed an opposition, including a declaration, but did not do so.[14] At the hearing, defendant was

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[13] Even if another hearing beyond the jury trial had been required under the federal due process clause, it does not necessarily follow that the hearing would have needed to be an *evidentiary* hearing. (See *Rein v. Socialist People's Libyan Arab Jamahiriya* (2d Cir. 2009) 568 F.3d 345, 354.) "What is required is that each 'affected individual has had a fundamentally fair chance to present his or her side of the story,' [citation], and to rebut opposing submissions." (*Ibid.*)

[14] Defendant claims that at a "full" hearing he could have presented evidence about his history as a licensed contractor. But he could have presented that evidence in a declaration filed in opposition to the CSLB's motion. Or, he could have simply outlined

afforded an opportunity to argue against revocation and he did so. He pointed to his success as a business owner and his thousands of customers. He maintained that the jury got it wrong and that he had not committed a crime. The trial court went out of its way to ensure that defendant was able to speak exhaustively on the issue. By the end, defendant expressed that he had nothing further to say.

The procedures utilized here have a low "risk of erroneous deprivation" of defendant's contractor's license. Jury trials have extensive safeguards and a high burden of proof which reduce the risk of erroneous conclusions. Moreover, if legal error is found to have infected the jury's conclusion, the judgment can be reversed along with the revocation order on which it is based. Indeed, that is what happened in the prior appeal in this case. Moreover, defendant had ample opportunity to request that the trial court decline to revoke his license despite his conviction. He could have filed written opposition to the CSLB's motion, and he was afforded a full opportunity to speak at the hearing. We fail to see much value, if any, in "additional or substitute procedural safeguards." (*Marquez, supra*, 240 Cal.App.4th at p. 112.)

Moreover, the government has a significant interest in avoiding a separate administrative hearing merely to prove diversion of funds yet again. Such a separate hearing would involve noticeable "fiscal and administrative burdens" for little benefit.

Finally, we acknowledge that defendant has a "dignitary interest" in being informed of the "nature, grounds and consequences of the action" and in enabling him to present his "side of the story." (*Marquez, supra*, 240 Cal.App.4th at p. 112.) But those dignitary interests were satisfied here. Defendant was informed of the nature, grounds and consequences of the proceedings and had ample opportunity to present his side of the story.

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his history as a licensed contractor at the October 28, 2014, hearing. Indeed, at the hearing he did briefly mention his history of success as a business owner.

We reject defendant's due process claim.[15]

DISPOSITION

The judgment and the order revoking defendant's contractor's license are affirmed.

_____
POOCHIGIAN, J.

WE CONCUR:

_____
GOMES, Acting P.J.

_____
KANE, J.

[15] In the midst of his constitutional due process argument, defendant cites the Administrative Adjudication Bill of Rights which requires "notice and an opportunity to be heard, including the opportunity to present and rebut evidence." (Gov. Code, § 11425.10, subd. (a)(1).) The statute also requires that "[t]he decision shall be in writing, be based on the record, and include a statement of the factual and legal basis of the decision…." (Gov. Code, § 11425.10, subd. (a)(6).) However, that statute clearly provides that the cited requirement applies to "[t]he governing procedure by which an *agency* conducts an adjudicative proceeding…." (Gov. Code, § 11425.10, subd. (a)(1), italics added.) Defendant cites no other persuasive authority that a written statement of decision was required here.